

BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:

POUK & STEINLE, INC.
2520 Rubidoux Boulevard
Riverside, CA 92519

Employer

Docket 09-R3D3-0491

**DECISION AFTER
RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code and having taken this matter under submission hereby renders the following decision after reconsideration.

JURISDICTION

On October 10, 2008, the Division of Occupational Safety and Health (Division) commenced an accident inspection at a place of employment in Loma Linda, California maintained by Pouk & Steinle, Inc. (Employer). On February 2, 2009, the Division issued one citation to Employer alleging a serious violation of Title 8, California Code of Regulations, section 2940.6(h) [conductive object used without suitable means to prevent accidental contact with energized conductor].¹

Employer timely appealed the citation, and an evidentiary hearing was held on November 4, 2009, before an administrative law judge (ALJ) of the Board. The ALJ issued a Decision on December 2, 2009, dismissing the citation.

On January 6, 2010, the Division filed a petition for reconsideration of the Decision, and Employer answered the petition. The Board took the Division's petition under submission on February 10, 2010.

ISSUE

Did Employer use "suitable means" to prevent accidental contact with a conductive object?

¹ Unless otherwise specified, all references are to California Code of Regulations, Title 8.

EVIDENCE

The summary of the evidence in the Decision is incorporated here by reference. We briefly summarize the facts.

Alejandro Escalante (Escalante), an employee and foreman of Employer, was part of a two-man crew assigned to install an underground section of 4-inch PVC pipe. The pipe was to be run under a street and eventually tap into a junction box located at the edge of the street. A trench, approximately 42 inches deep, was dug across the street to accommodate the laying of pipe. (See Exhibits 7(a) - (c) depicting accident area.)

Escalante needed to cut a hole in the side of the junction box in order to accommodate the run of PVC pipe. He opened the cover of the junction box and saw several insulated, energized cables.² Based on his past experience, he determined that 8 to 9 inches of clearance was required in order to safely perform the cuts using a reciprocating saw. Using a tape measure, he measured the distance from the inner wall of the junction box to the nearest cable and confirmed he had 8 ³/₄ inches of clearance, which was sufficient per his prior determination.

Escalante then stood in the 42-inch deep trench and began cutting into the junction box that was located at ground level. His first cut went without incident. During the second cut, flames and/or an explosion occurred, burning Escalante on his arms, hands, and face.³ His injuries required hospitalization for three days.⁴

The Division cited Employer for violating section 2940.6(h) [conductive object used without suitable means to prevent accidental contact with energized conductor].

REASONS FOR DECISION AFTER RECONSIDERATION

Section 2940.6(h) states as follows:

Conductive objects of a length capable of contacting energized conductors shall not be carried into the level of such conductors unless suitable means are taken to prevent accidental contact.

The ALJ concluded that Escalante was using a conductive object (the reciprocating saw blade) when he accidentally cut through the cable's insulation and made contact with an energized conductor (the underlying wire). (Decision, p. 4.) These findings are not in dispute.

² Escalante testified that he was aware that the cables were energized at 12,000 volts.

³ Escalante was alone at the time of the accident as his laborer assistant had left to get a drink of water. (Decision, p. 2, bottom.)

⁴ Employer stipulated that Escalante sustained serious injuries on the day of the accident.

Rather, the parties dispute whether Escalante's actions – his visual inspection of the junction box, followed by his measurement of 8 ¾ inches of available clearance space – qualified as a “suitable means” to avoid accidental contact.

The Division argues that Escalante should have waited for an inspector from Southern California Edison (Edison) to be on location prior to starting the cuts.⁵ (Petition, p. 3.) It stresses that an “extra pair of eyes” was required in order for Escalante's actions to qualify as suitable, since the construction plans contained a warning that breaking through the wall of the junction box was to be done “ONLY under supervision of Edison Co. personnel.” (Decision, p. 5, top; see Construction Plans (original emphasis), Ex. 9.)

The Division's argument fails for the following reasons. To begin with, Escalante testified that the Edison inspector gave him permission to perform the work without supervision. The Edison inspector was not called as a witness, and the ALJ credited Escalante's testimony as showing that he was relieved of any such supervision requirement. (Decision, p. 5.) Therefore, any probative value that the warning may have had regarding Escalante's actions and whether they were suitable or not was greatly diminished when Edison gave him permission to proceed on his own.

Furthermore, even if we assume that Edison supervision was required per the construction plans, the Division only showed it was required by Edison. The Division did not provide any link between Edison's requirement for supervision and the safety order's requirement to provide a “suitable means” to avoid contact. In other words, although Edison's requirement may arguably be seen as adding an extra layer of safety, being safer, by itself, does not mean that Escalante's actions were “not suitable.”⁶

The Board has consistently held that it cannot read terms into a safety order that the Standards Board has not included. (*Webcor Construction*, Cal/OSHA App. 08-2365, Denial of Petition for Reconsideration (Sept. 2, 2010).) Here, the Division did not produce any evidence to support its contention that supervision was required in order for Employer's actions to qualify as “suitable” under the safety order. Therefore, the Division failed to prove that Employer did not use suitable means to avoid inadvertent contact.^{7,8}

⁵ Southern California Edison was the owner of the equipment that was being worked on by Employer.

⁶ Indeed, were we to adopt the Division's position, a procedure would automatically be deemed “unsuitable” upon the finding that an extra layer of precaution could have been implemented.

⁷ There are other safety orders that use the term “suitable means.” Examples include section 1541(h)(3) [“If excavation work interrupts the natural drainage of surface water (such as streams), diversion ditches, dikes, or other *suitable means* shall be used to prevent surface water from entering the excavation.”]; Section 3448 [“When employees are required to work in or about farm structures such as permanent pools, ponds, water tanks, or reservoirs ... where the slope and construction would make exit difficult, ladder, steps or other *suitable climbing means* ... shall be provided.”]; Section 1644(c)(6) [“Where uplift may occur, panels shall be locked together vertically by pins or other equivalent *suitable means*.”]. Section 3941 defines the word “guarded” as “shielded, fenced, enclosed or otherwise protected according to these orders, by *means of suitable* enclosure guards, covers or casing guards, trough or “U” guards,

DECISION

For the reasons stated above, Employer's appeal is granted.

ART R. CARTER, Chairman
ED LOWRY, Member
JUDITH S. FREYMAN, Member

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shield guards, standard railings or by the nature of the location where permitted in these orders, so as to remove the hazard of accidental contact." Notably, these safety orders contain references to specific objects or a method of use that qualifies as suitable, and then gives employers the option to use an equivalent, "suitable" substitute.

However, because such reference aids are not present in the instant safety order which only requires "suitable means," we are not at liberty to require safer and/or more specific options that would help prevent accidental contact such as physical blocking, de-energization, or supervision. (*Webcor Construction*, Cal/OSHA App. 08-2365, Denial of Petition for Reconsideration (Sept. 2, 2010) [Board cannot read terms into safety orders that the Standards Board has not included].)

⁸ It may be the case that the Division cannot prove what "suitable means to avoid inadvertent contact" should have been used here. If the safety order is unenforceable for this practical impossibility, the Division may request the Standards Board to re-evaluate the standard. The Board is concerned that inserting a conductive object into a junction box that contains 12,000 volts of electricity insulated only by material that can be penetrated by the conductive object, is a very dangerous work situation and may need a more specific and enforceable standard than §2940.6(h).

The Board also points out that the rationale for implementing section 2940.6(h) was to provide equivalent protection as section 2940.2(a). (See Standards Board Rulemaking File, Public Hearing Date May 24, 1979.) Section 2940.2(a) requires certain clearances to be met when energized conductors are exposed, while the instant safety order, section 2940.6(h), applies to energized conductors that are *not exposed*. However, the fact that a conductor is covered or insulated does not provide protection when, as here, an object can easily cut through such insulation. Such insulation is rendered a nullity and the insulated conductor is essentially "exposed." Under these conditions, section 2940.6(h) does not afford an equivalent level of protection as section 2940.2(a), as originally intended by the Standards Board.